IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.711 OF 2006

Philomena Leo Fernandes
and Anr. ...Petitioners.

Versus

The State of Maharashtra
and Ors. ...Respondents.

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Mr.Hina Mody Advocate for the Petitioners.
Mrs.U.V.Kejariwal, APP, for the State.
Mr.V.S.Paradkar Advocate for Respondent No.3 &4.

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CORAM : D.G.DESHPANDE &
SMT.V.K.TAHILRAMANI, JJ.
DATED : APRIL 10, 2006.

P.C.:

1. Heard learned Advocate for the petitioners, Mr.Paradkar learned Advocate for respondent Nos.3 & 4 and the learned APP for respondent Nos.1 & 2.

2. This petition is in respect of custody of two children Alstone and Anthea, aged about 4 years and 8 years, who are children of petitioner No.1 and respondent No.3. The petitioner No.1 is the mother and respondent No.3 is the father of the two children. The divorce proceedings are pending between the two parties.

3. It is the contention of the petitioners that the preventive order has been passed by the Court at Sarjaha to the effect that the children are prevented

from travelling. The said order is annexed to the petition vide Exh.C. The said order is dated 21st March, 2006. The learned Advocate for the petitioners has contended that in spite of the order of the Court at Sarjaha, the two children have been brought to Bombay by respondent No.3 and they were residing with respondent No.4 who is the sister of respondent No.3.

4. On the last occasion the learned Advocate for the petitioners expressed apprehension that as soon as the notice of this Petition is served on respondent No.4 in whose custody the children were, respondent No.4 will remove the children out of the jurisdiction of this Court. Looking to the urgency of matter and in view of the apprehension expressed on the last occasion i.e. on 28th March, 2006, notice came to be issued to respondent No.4; and respondent No.2 i.e. Senior P.I. of Santacruz (E) Police Station was directed to depute some officer to verify whether the children are with respondent No.4 and to obtain an undertaking from respondent No.4 that she will not remove the children out of the jurisdiction of this Court until further orders. Notice was also given to respondent No.4 to remain present in the Court on the next date.

5. Today, respondent No.4 is present in Court alongwith the two children. So also, respondent No.3 is present in the Court. Respondent No.3 has filed his

affidavit which is taken on record. So also the learned APP has filed a report stating that the order of this Court dated 28th March, 2006 is complied with.

6. In the affidavit, respondent No.3 has stated that he is working at Sajahara U.A.E. and that the children are in his care and custody since 2004 and he is maintaining them. Both the children are going to school and as there were school vacations, respondent No.3 i.e. the father of the children had sent the children to his sister i.e. respondent No.4 in India for a little change. The Schools have already started from 1st day of April, 2006 and he was to take the children back to U.A.E. to resume the school after vacations. However, as a copy of order dated 28th March, 2006 was served upon respondent No.4, the children could not be sent to Sarjaha. It is further stated that if the children do not resume school immediately, they will not be allowed to pursue their studies as their names would be removed from the school and their admissions would stand cancelled.

7. The learned Advocate for the petitioners has admitted that the children were with respondent No.3 as petitioner No.1 herself had sent the children to respondent No.3. However, it is her contention that she has sent the children to her husband only for limited period. Moreover, it is her contention that

the children could not be removed from Sarjaha on account of the order which is at Exh.C. It is pertinent to note that though there are divorce proceedings between the parties, petitioner No.1 has not applied for the custody of these two children.

8. On the other hand, Mr.Paradkar, learned Advocate for respondent No.3 has submitted that respondent No.3 was not aware of the order dated 21st March, 2006 which is at Exh.C. The said order was never served upon him and therefore he was not aware of any such order restricting him from taking the children out of Sarjaha. It is stated that he was about to take his children back to Sarjaha, however, it was only on account of the order of this Court dated 28th March, 2006 that he could not take his children back to Sarjaha. Respondent No.3 has stated that he will immediately take his children to Sarjaha so that the children can rejoin their studies and their admission in the school is not cancelled. We have not expressed any opinion as regards to rights of petitioner No.1 or respondent No.3 in respect of custody of the children. We record the undertaking and statement of respondent No.3 who is present in Court that he will take the children to Sarjaha only at the address given in the Petition and not to any other State or Country and he will leave Mumbai with the children for Sarjaha latest by Friday i.e. 14th April, 2006.

9. Looking to these facts, the earlier order dated 28th March, 2006 restraining the children from being removed out of the jurisdiction of this Court, is vacated.

10. Petition is disposed of with above observations.

11. Concerned parties to act upon an Authenticated copy of this order.

(D.G.DESHPANDE,J.)

(SMT.V.K.TAHILRAMANI,J.)